No. 941765 APR 26 1995

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In The

Supreme Court of the United States

October Term, 1994

INN OF MIAMI AIRPORT, INC.,

Petitioner,

vs.

PERREN-VIBES MUSIC, INC., POLYGRAM INTERNATIONAL PUBLISHING, INC., MUSIC SALES CORP., FAMOUS MUSIC CORPORATION, GIORGIO MORODER PUBLISHING COMPANY, FUNKY METAL MUSIC, POLISH PRINCE MUSIC, BIG ELK MUSIC, FLYTE TYME TUNES, HIDEOUT RECORDS AND DISTRIBUTORS, INC., AGE TO AGE MUSIC, INC., EDWARD GRANT, INC. AND YELLOW ELEPHANT MUSIC,

Respondents.

Petition For A Writ Of Certiorari To The United States Court of Appeals for The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Does *TWENTIETH CENTURY MUSIC CORP. V. AIKEN*, 422 U.S. 151 (1975) provide protection for passive reception of licensed public broadcasts on a single receiving unit that survives the 1976 revisions to the Copyright Act and that the Eleventh Circuit contravened by failing to apply a proper test for asserted First Amendment interests?

Did the Eleventh Circuit violate the applicable standard of review of summary judgments by affirming a summary judgment on the defense of innocent infringement on the grounds that there was "ample record support" for the "finding" of the lower court?

LIST OF ALL PARTIES TO THE PROCEEDINGS

Inn of Miami Airport, Inc.
Perren-Vibes Music, Inc.
Polygram International Publishing, Inc.
Music Sales Corp.
Famous Music Corporation
Giorgio Moroder Publishing Company
Funky Metal Music
Polish Prince Music
Big Elk Music
Flyte Tyme Tunes
Hideout Records and Distributors, Inc.
Age to Age Music, Inc.
Edward Grant, Inc.
Yellow Elephant Music

RULE 29.1 LISTING

Petitioner, INN OF MIAMI AIRPORT, INC., is not publicly traded, and has no subsidiary corporations. Its parent corporation is Northeast Inn of Meridien, Inc. It has no affiliated corporations.

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OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED BELOW

Inn of Miami Airport, Inc. v. Perren-Vibes Music, Inc., unpublished (11th Cir. 1991), reproduced herein as Appendix A; and *Perren-Vibes Music, Inc. v. Inn of Miami*

Airport, Inc., unpublished (S.D. Fla. 1994), reproduced herein as Appendix C.

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. Section 1254 (1) to issue a writ of certiorari. The jurisdiction of the Eleventh Circuit Court of Appeals was based upon 28 U.S.C. Section 1291. The District Court's jurisdiction was based upon 28 U.S.C. Section 1331. The action was for violation of the Federal Copyright Act, 17 U.S.C. Section 101 et seq.

Final Judgment was entered on June 14, 1993, in the District Court. The Final Judgment of the United States District Court of Appeal was entered on January 27, 1995.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 8, Clause 8, United States Constitution:

> The Congress shall have the power to promote the Progress of Science and Useful Arts, by securing for limited times to authors and inventors the exclusive right to their respective writing and discoveries.

Amendment I, United States Constitution:

> Congress shall make no laws respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people

peaceably to assemble, and to petition the Government for a redress of grievances.

17 U.S.C. Section 106, in part:

Subject to sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly . . .

17 U.S.C. Section 101:

To "perform" a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sound accompanying it audible.

17 U.S.C. Section 110(5):

Notwithstanding the provisions of section 106, the following are not infringements of copyright:

(5) communication of a transmission embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes, unless –

(A) a direct charge is made to see or hear the transmission; or

(B) the transmission thus received is further transmitted to the public . . .

17 U.S.C. Section 504(c)(2), in part:

> (2) In a case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum not more than $100,000. In a case where the infringer sustains the burden of proving, and the court finds, that such infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright, the court it (sic) its discretion may reduce the award of statutory damages to a sum of not less than $200.

STATEMENT OF THE CASE

A. Factual Background

This is an action for copyright infringement, five counts of which occurred when Plaintiffs' compositions were publicly broadcast by a licensed radio broadcaster. App.C-7. The broadcasts were received on a single radio receiver that was connected to six speakers which were located twenty feet apart on opposite ends of a small dance floor. App.C-10.

Petitioner at one time had an ASCAP license, when it formerly had live music or disc jockey entertainment in its combined restaurant/lounge area. App.C-3,4. When the license expired, Petitioner did not renew the license, and instructed its personnel to disconnect the DJ booth. *Id.* That instruction was not immediately implemented, and local personnel instructed the DJ to play only Latin music in an attempt to avoid infringing compositions of

ASCAP's membership. App.C-5,6. The individuals who directed cessation of the DJ booth were not aware for some time that local personnel continued to permit DJ performances. *Id.*

On May 24, 1991, ASCAP investigators reported that infringements had occurred by the playing of records by a disc jockey *and* by the reception of licensed public broadcasts over a local radio station. App.C-7. Suit was instituted on those claims of infringement. As of the date of trial, the practice was to play the television with the sound off except during news and sporting events. App.C-6,7.

B. Proceedings Below

Following the filing of the complaint, the parties engaged in minimal discovery. Plaintiffs moved for summary judgment, which was granted: the court found that infringing activity had occurred and also "found" that the Inn's infringement had been "not innocence but indifference." App.A-2. After a bench trial on Plaintiffs' claim for enhancement of statutory damages due to alleged willful infringement, minimal damages were awarded. *Id.* C-12. However, the trial court acknowledged various communications between ASCAP[1] and the Inn that identified use of a DJ as the infringing activity. App.C-5 ¶ 8. The trial court also acknowledged the efforts to cease "playing" of protected works that were directed to the

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[1] The American Society of Composers, Authors, and Publishers, a membership group that licenses "performances" of its members under a non-exclusive license.

use of a DJ and records, and the fact that management believed use of a single radio was permissible. *Id.*, ¶¶ 9-10; C-6, ¶ 14.

On appeal, Petitioner challenged entry of summary judgment on the defense of innocent infringement as to counts arising from use of the radio where the trial court had acknowledged that the issue of willfulness required a full trial. App.E-8.

Although the circuit court acknowledged that the trial judge had "found" that the Inn's conduct was not innocent, it affirmed that finding because "the record . . . amply supports the District Court's rejection of the defense. . . . " App.A-2.

In addition, Petitioner challenged application of the Copyright Act as creating a "chilling effect" that offends the First Amendment. *Id.* The Eleventh Circuit acknowledged the nature of that claim, but failed to apply a proper First Amendment test, ruling that the claim was governed by *Cable/Home Communication Corp. v. Network Productions, Inc.*, 902 F.2d 829 (11th Cir. 1990) and *Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc.*, 600 F.2d 1184 (5th Cir. 1979). Whether *Aiken* has survived the copyright revisions with regard to penalizing inadvertent passive reception, and whether *Aiken* is controlling authority, was not addressed.

REASONS FOR GRANTING THE WRIT

This Court may grant a writ of certiorari:

> (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter . . . or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> * * *
>
> (c) When a state court of a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

Rule 10.1, Supreme Court Rules. The judgment of the Eleventh Circuit in this case supports issuance of a writ of certiorari under both subparts of that rule.

The decision conflicts with *Aiken* by rejecting out-of-hand its impact on the interrelationship of First Amendment rights and copyright claims when infringement occurs as a result of passive inadvertent reception of licensed public radio broadcasts.

In addition, the issues raised by Petitioner with regard to the continuing effect of *Aiken* and the subsequent revisions to the Copyright Act have not been, but should be, settled by this Court. The district and circuit courts are in disarray in construing the homestyle exemption, and cannot even agree on which of the facts of *Aiken* should be given weight on a case-by-case analysis of the

homestyle exemption. There is no recognition of *Aiken's* remaining concerns of "inequity" or the purpose and effect of the particular radio usage insofar as they embody First Amendment rights.

Finally, the Eleventh Circuit has cast aside traditional standards of review of summary judgments and erroneously applied a sufficiency of the evidence standard of review on the disposition of the innocent infringement defense. This is particularly deserving of supervision where issues of willfulness and innocence are intertwined and the result provides a disincentive to adjudicate the homestyle defense or First Amendment rights.

I.

THE ELEVENTH CIRCUIT MISAPPLIED *TWENTIETH CENTURY MUSIC CORP. V. AIKEN* BY FAILING TO TEST ASSERTED FIRST AMENDMENT INTERESTS AGAINST INADVERTENT PASSIVE COPYRIGHT INFRINGEMENTS

A. The First Amendment Underpinnings of Aiken:

This Court's decision in *Aiken* raised important considerations of First Amendment protection where application of the Copyright Act to inadvertent infringement by a passive listener who receives a licensed public broadcast is sought. This Court recognized in *Aiken*, the ultimate difficulty in extending copyright protection to "passive viewers" (i.e., listeners), when the broadcaster has already been licensed to perform the works:

> . . . [A] ruling that a radio listener 'performs' every broadcast that he receives would be highly inequitable for two distinct reasons. First,

> a person in Aiken's position would have no sure way of protecting himself from liability for copyright infringement *except by keeping his radio set turned off.* For even if he secured a license from ASCAP, he would have no way of either foreseeing or controlling the broadcast of compositions whose copyright was held by someone else.

Aiken, supra, 422 U.S. at 163-164.[2] This Court thus clearly considered the alternative to inadvertent copyright infringement too costly – passive listeners should not have to turn their radios off to protect against reception of uncontrolled and inadvertent copyrighted "performances" by the broadcaster.

Petitioner submits that the foundation of this "highly inequitable" situation is the First Amendment's protection of the rights of access to news, events, and works in the public domain.[3] Such rights of access have been previously acknowledged. See *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 390 (1969) (First Amendment rights of the public in radio signals); *Universal City Studios, Inc. v. Sony Corp. of America,* 464 U.S. 417 (1984) (First Amendment access to television broadcasting for non-commercial home use). The First Amendment has been acknowledged as supplying a countervailing interest to

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[2] All emphasis is added unless otherwise indicated.

[3] Protection for authors or composers is designed to advance the ultimate availability of works *to the public.* "The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors." *Fox Film Corp. v. Doyal,* 286 U.S. 123, 127 (1932). See also *Aiken,* supra, 422 U.S. at 156.

copyright protection. *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 311 (2d Cir. 1966) (Lumbard, C.J., concurring).

First Amendment protection extends to commercial speech and art, literature, as well as to news, and protects the listener as well as the speaker. *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. 748, 757, 761, 764 (1976). Cf. *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 596 (1980) (Rehnquist, J., dissenting) ("[A]rt, literature and the like may contribute to important First Amendment interests of the individual in freedom of speech.")

At least one circuit court has relied upon this court's statement of the purpose of Aiken's radio. In *Edison Bros. Stores, Inc. v. Broadcast Music, Inc.*, 954 F.2d 1419 (8th Cir. 1992), cert. denied, ___ U.S. ___, 112 S.Ct. 1995 (1992), the defendant owned 2500 stores, most of which were equipped with a receiver and two speakers. The average size of each store was 2268 square feet, of which 800 to 1200 were open to the public. In rejecting a ruling based upon size of the establishment, the court relied, inter alia, upon language in *Aiken* that use of the radio had been for music, news, entertainment and commercial advertising, as providing support for its holding that radio usage was not infringement.

Professor Nimmer also acknowledges the ultimate constraint on copyright that the First Amendment imposes. *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, M.B. Nimmer, 17 UCLA

L.Rev. 1180 (1970). As Professor Nimmer explains, copyright and free speech and press present inconsistent interests:

> It cannot be denied that the copyright laws do in some degree abridge freedom of speech, and if the first amendment were literally construed, copyright would be unconstitutional.

Id., 1182. One means of balancing these interests is found in the "fair use" exception contained in the Copyright Act where intentional use of copyrighted work is addressed.

However, Professor Nimmer recognizes that the "fair use" doctrine is distinct from the limitations of the First Amendment:

> I would suggest that a grave danger to copyright may lie in the failure to distinguish between the statutory privilege known as fair use and an emerging constitutional limitation on copyright contained in the first amendment. The scope and extent of fair use falls within the discretion of the Congress. The limitations of the first amendment are imposed upon Congress itself.

Id., at 1200.

Petitioner submits that the reasoning of *Aiken*, and its result, are grounded in the First Amendment and have direct impact on the construction and application of the homestyle exemption.

B. The Attempt to Limit Aiken:

In the 1976 revisions to the Copyright Act, Congress attempted to limit the *Aiken* decision to circumstances now known as the "homestyle exemption." 17 U.S.C. Section 110(5). The exemption is available only where reception is made by a single receiving apparatus "of a kind commonly used in private homes." Id. Many courts have found that the legislative history indicates an intent to make *Aiken* the outer limit of the exemption. *Broadcast Music, Inc. v. Claire's Boutiques, Inc.*, 949 F.2d 1482, 1488-1489 (7th Cir. 1991), cert. denied, ___ U.S. ___, 112 S.Ct. 1942 (1992).

Most courts have thus looked to the physical details described in *Aiken* to determine applicability of the homestyle exemption. E.g., *International Korwin Corp. v. Kowalczyk*, 665 F.Supp. 652 (N.D.Ill. 1987), *aff'd.*, 855 F.2d 375 (7th Cir. 1988) (radio connected to eight recessed speakers by concealed wiring not homestyle); *U.S. Songs, Inc. v. Downside Lenox, Inc.*, 771 F.Supp. 1220, 1227 (N.D.Ga. 1991) (radio connected to twenty speakers not homestyle); *Gnossos Music v. DiPompo*, 13 U.S.P.Q.2d 1539, 1542 (D.Me. 1989) (radio connected to eight to ten recessed speakers not homestyle). But see, *Claire's Boutiques*, supra, 949 F.2d 1482 (radio connected to two concealed speakers by means of concealed wiring over distances up to 35 feet was homestyle); *Springsteen v. Plaza Roller Dome, Inc.*, 602 F.Supp. 1113 (D.N.C. 1985) (radio wired to six speakers on light poles at golf course, covering 7,500 square feet, was homestyle).

As a result of the focus on physical descriptions, the overwhelming number of decisions have abandoned any

attempt to place the original *Aiken* decision in its conceptual framework of the inequity that this Court addressed and that Petitioner submits is grounded in the First Amendment. The physical details of the equipment described in *Aiken* have been divorced from the *purpose* and effect of that equipment that were announced at the beginning of this Court's discussion:

> Aiken usually turns on the radio each morning at the start of business. Music, news, entertainment, and commercial advertising broadcast by radio stations are thus heard by Aiken, his employees, and his customers during the hours that the establishment is open for business.

422 U.S. at 152.

C. The Claim of Chill and an Aiken Result:

The Eleventh Circuit decision reaches a predictable extension of the Congressional attempt to limit *Aiken* by reference to equipment, and the failure of subsequent judicial decisions to recognize the source of *Aiken*'s analysis. Although the court recognized that Petitioner claimed a "chill" on First Amendment rights, the court nevertheless disposed of that claim by relying upon case law asserting First Amendment rights *in intentional use of the copyrighted material. Cable/Home Communications Corp.*, supra, 902 F.2d 829; *Dallas Cowboys Cheerleaders, Inc.*, supra, 600 F.2d 1184. Neither involved a claim of excessive "chill" of First Amendment rights in non-copyrighted material.

In *Cable/Home Communications*, the Defendants promoted and sold "pirate chips" that were used to descramble pay television programming. In *Dallas Cowboys Cheerleaders*, defendants made and marketed a mimicry of a poster of the Dallas Cowboys Cheerleaders. It is evident that the asserted First Amendment rights in these two cases were of a different nature than those asserted in this case.

In addition, those parties *did* have the benefit of an adjudication in which First Amendment standards were applied to the circumstances of the claim.[4] In *Cable/Home Communications*, the Circuit Court assessed the scope of an injunction insofar as it might affect future conduct *and* the nature of the First Amendment interest asserted. The Court concluded that the speech promoting pirate chips was commercial speech directed to illegal activity and therefore unprotected. *Cable/Home Communications*, 902 F.2d at 850. In *Dallas Cowboys Cheerleaders*, the defendants on appeal challenged the "weighing [of] the factors" that they contended had led the lower court to transgress their First Amendment rights.

By relying on those cases, the instant decision fails to recognize First Amendment rights of access to public broadcasts or works in the public domain *other than* the purportedly infringed works and it thus conflicts with *Aiken*. In addition, it fails to apply a test that comports with the First Amendment, as was concededly done in each of those cases, and as appears to have been done in

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[4] The Eleventh Circuit did not approve a First Amendment test by the trial court, because the trial court summarily rejected the defense without analysis.

Aiken. Instead, the decision applies a per se rule of absolute infringement.

This Court had held in *Aiken* that it would be unfair and unwise to make a passive listener who receives a licensed public broadcast on a single receiving apparatus vulnerable to suit under the Copyright Act, because the only way to limit that exposure would be *to keep the radio turned off*. Without articulating the use of a First Amendment test, it is nevertheless apparent that this Court compared the circumstances of use of the single radio against the claims of copyright and determined that the use of the radio was protected.

By contrast, the Eleventh Circuit here simply recited that the First Amendment does not create a right to "trammel upon" copyright interests in the musical compositions infringed, without even acknowledging the asserted interest in access to news, events, and works in the public domain. See generally, *Sony Corp.*, supra, 464 U.S. at 443 (discussion of impact that injunction would have on non-infringing activity). This Court reversed application of such an absolutist and conclusory rule of law in the face of a First Amendment interest in *New York Times Co. v. Sullivan*, 376 U.S. 254, 264 (1963).

In that case, a defense to an action for libel was grounded in First Amendment freedoms of speech and press. These constitutional claims were summarily rejected by a ruling that the First Amendment "does not protect libelous publications." Id., at 254, 264. This Court rejected that conclusion and its concept of "talismanic immunity," ruling that the assertion of a constitutional claim "must be measured by standards that satisfy the

First Amendment." Id., at 269. The instant decision accords Petitioner's claim of excessive chill upon its right of access to public licensed radio broadcasts no more appropriate a standard of consideration than the Alabama court accorded the publisher's claims in *New York Times*.

The importance of this failure extends beyond the particulars of the case. Lower courts in general have failed to address First Amendment claims in the context of inadvertent reception of public broadcasts, and this Court has not addressed the necessity of applying proper First Amendment standards in such cases since the Copyright revisions.

This Court has not addressed the issue whether Congress, by rendering passive reception of a licensed broadcast susceptible of falling within the historic term "performance" if equipment does not meet the physical specifications described in *Aiken*, may properly limit the First Amendment reach of the *Aiken* decision. The result perceived as "highly inequitable" by the *Aiken* court is made manifest by the instant decision.

D. The Need for Articulation of an *Aiken* First Amendment Test and the Unfairness and Prejudice to Petitioner in the Absence of Such a Test:

This issue should be settled by this Court, since lower courts are in some disarray in their efforts to reconcile application of the homestyle exemption with application of the *Aiken* decision.

Some courts stress the distinction of concealed as opposed to non-concealed wiring, although such a distinction does not appear in *Aiken*. See *Claire's Boutiques*, supra, 949 F.2d at 1493, 1494 (concealed wiring supports denial of the exemption although the *Aiken* equipment presumably had hidden wiring). Some courts consider the size of the business establishment in square feet to be dispositive, but others consider that not material. Compare *Hickory Groves Music v. Andrews*, 749 F.Supp. 1031, 1039 (D.Mont. 1990) (greater seating area than *Aiken* alone defeats exemption because exemption requires finding that business is "small business establishment") with *Edison Brothers Stores*, supra, 954 F.2d at 1422 n.4 (physical size is not a factor to consider). Some courts consider the profitability of the business, while another states that revenue should play no part in consideration of the exemption. Compare *Hickory Grove Music*, supra, 749 F.Supp. at 1038 (defendants should reveal revenue in order to prove applicability of exemption) with *Edison Brothers Stores*, supra, 954 F.2d at 1424 n.7 (legislative summary of exemption does not mention financial restrictions).

And where there is agreement or a trend in the decisions, that trend appears to be away from allowance of any exemption. See *Hickory Groves Music*, supra, 749 F.Supp. at 1039 n.2 (decisions since 1985 much more conservative).

But a reading of the text of *Aiken* does not suggest that its outcome depended solely on such considerations.

This Court took note of the fact that the radio was implemented for the purpose of hearing "music, news, entertainment and commercial advertising." The Court further took note that broadcasts were heard by *Aiken* and his employees, as well as his customers. This Court acknowledged that the copyright monopoly must "ultimately serve the cause of promoting broad public availability of literature, music, and the other arts." 422 U.S. 151, at 155. Finally, this Court held that making *Aiken*'s use of the radio subject to the Copyright Act would "result in a regime of copyright law that would be both wholly unenforceable and highly inequitable," since *Aiken* could only protect himself by "keeping his radio set turned off." 422 U.S. 151 at 162. The weight of decisions of the lower courts do not incorporate the concerns of purpose and effect of radio usage or the inequity of requiring abandonment of all radio usage as the *sole effective protection* against inadvertent infringement.

Until and unless this Court reaffirms the importance of balancing all aspects of the radio usage in terms of the competing First Amendment interest asserted, there is every indication that courts will continue in mistaken focus on physical details divorced from conceptual underpinnings of purpose and effect. In addition, the homestyle exemption itself will be effectively negated by the sheer cost of litigating its applicability in the uncertain and unpredictable world of jurisprudence. Such a result cannot and does not enhance the important First Amendment considerations that Petitioner has raised and that support the *Aiken* decision.

II.

THE ELEVENTH CIRCUIT IGNORED APPLICABLE STANDARDS OF REVIEW

A. Violation of Established Standards of Review:

The Eleventh Circuit violated established standards of review of summary judgments. Its review is plenary, and it should apply the same legal standards as those the district court applies. *Hammer v. Slater*, 20 F.3d 1137, 1140 (11th Cir. 1994). Summary judgment must be based upon the movant's demonstration that "there is an absence of evidence to support the non-movant's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986); *Adickes v. S.H. Kress and Company*, 398 U.S. 144 (1970). On motion for summary judgment, the evidence and all inferences from it must be viewed in a light favorable to the non-movant and the movant must show that the case is "devoid of any need for factual determinations." *Tippens v. Celotex Corp.*, 805 F.2d 949, 952-953 (11th Cir. 1986). Finally, summary judgment is not an opportunity for the judge to engage in trial by affidavit or to resolve issues of fact. *Jackson v. Duckworth*, 955 F.2d 21, 22 (7th Cir. 1992); *Donahue v. Windsor Locks Board of Fire Commissioners*, 834 F.2d 54, 58 (2d Cir. 1987); *Scharf v. United States Attorney General*, 597 F.2d 1240, 1243 (9th Cir. 1979).

The Eleventh Circuit failed to apply the appropriate standard of review. Although it acknowledged that the lower court had made a "determination" of inadvertence, as opposed to innocence, it failed to reverse the summary judgment. It thus condoned the use of the summary judgment procedure as a means for the lower court to try the issue of innocence on affidavits and depositions. The

Eleventh Circuit then compounded that error by reviewing the record and determining that the record supported that determination. Sufficiency of the evidence to support a verdict is *not* the standard of review of summary disposition of a claim or defense.

It is clear, too, that the district court had before it evidence of innocence. Evidence of "inadvertence" may have risen to the level of proof of "innocence" had Petitioner been permitted to complete its proof at trial and had the trial judge been permitted the opportunity to assess the demeanor and credibility of crucial witnesses.

Secondly, the district court had specifically ruled that the issue of "willfulness" required resolution at trial. But willfulness is but the opposite pole of the putative infringer's conduct. For example, in *Pye v. Mitchell*, 574 F.2d 476, 483 (9th Cir. 1978), the court described notice of copyright ownership and infringement as the bright-line test for the innocent/willful distinction. Recognition of *any* factual issue on notice *should* have mandated trial on *all* evidence relating thereto.

B. The Unfairness of Precluding Trial on Innocence:

The effect of imposing a different standard on summary judgment for a defense of innocence than for the claim of willfulness if self-evident. Although Petitioner was given an opportunity to prove lack of willfulness at trial, it was required to meet that same level of proof at the summary judgment stage on its defense of innocence. But the existence of factual issues was enough to preserve

the claim of willfulness for trial. At trial, the court determined that the infringement *was not willful*. But evidence like lack of notice of the particular infringing activity should correspondingly have been considered fully on the pretermitted defense that damages should be reduced. *Cf., Jobete Music Co.*, supra, 788 F.Supp. 262 ("willfulness" is awareness of infringement, mirroring statutory standard for reducing statutory damages for lack of awareness).

Imposing such a burden on the right to reduce statutory damages imposes a penalty on reliance on the homestyle exemption or upon *Aiken*'s intent to protect limited passive reception of licensed broadcasts over which small businesses have no control. A subsequent adjudication at full trial should not defeat the bona fides of a belief in the availability of a defense. Such a belief is evidence of innocence, notwithstanding that the defense is later abandoned or rejected. *E.g., Hickory Grove Music*, supra, 749 F.Supp. 1031 (infringement not willful where defendant had good faith belief in applicability of home system defense). See also, *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 594 (1985) (Brennan, J., dissenting) ("[A]wareness of an objection [to infringing activity] that has a significant chance of being adjudged unfounded cannot amount to bad faith. Imputing bad faith on the basis of no more than knowledge of such an objection, the Court *impermissibly prejudices the inquiry and impedes arrival at the proper conclusion*").

C. A Claim of Innocence, Founded Upon *Aiken* and its Intent to Protect Parties Like Petitioner, Merits an Evidentiary Hearing of Equal Status with the Claim of Willfulness:

This Court in *Aiken* recognized the scope of potential copyright infringement actions if it held the passive reception of licensed broadcasts subject to the Copyright Act:

> A rule which is very hard for laymen to apply so as to keep clear of litigation was established by the La Salle Hotel case. The hotel was heavily liable if it rebroadcast unlicensed music, but how could it protect itself: Must it maintain a monitor always on the job to sit with a list before him pages long showing what pieces are licensed and turn off the master set the instant an unlicensed piece comes from the broadcasting station? The dilemma thus created by the Copyright Act was mitigated for a time by the machinery of ASCAP, which was a device entirely outside the statute. The hotel could obtain a blanket license from ASCAP and thus be pretty sure of safety about all the music which came through its master set. . . . [But if] any composer outside of ASCAP has his music broadcast, what is the hotel to do? Besides getting an ASCAP license, must the hotel bargain separately with every independent composer on the chance that his music may come through to the hotel patrons?

This Court also recognized the enormous number of small establishments that would become subject to such actions:

> One has only to consider the countless business establishments in this country with radio or television sets on their premises – bars, beauty shops, cafeterias, car washes, dentists' offices, and drive-ins – to realize the total futility of any evenhanded effort on the part of copyright holders to license even a substantial percentage of them.

422 U.S. at 162. Small businesses that lack the funding and resources of ASCAP face not only the prospect of statutory damages but also attorneys' fees if they elect to assert and adjudicate the appropriate defenses.

If a defendant is precluded from proving innocence at trial notwithstanding the necessity of hearing additional evidence to determine willfulness, the exposure to an award of fees is greatly increased. Although the award of fees is discretionary, one of the greatest factors considered to mitigate against such an award is the defendant's lack of awareness regarding the actual form of infringement or "innocence." *McCulloch v. Price*, 823 F.2d 316, 323 (9th Cir. 1987). The premature and unfair disposition of the defense of innocence by summary judgment "determination" rather than by full evidentiary trial, guarantees that the risk of onerous financial exposure is increased. This creates substantial disincentive to defend in good faith a belief in the availability of the homestyle exemption *or* a bona fide claim of First Amendment rights in non-copyrighted works in the public domain.

Permitting summary disposition on "innocence" thus places a price tag on a good faith submission of the exemption to the trial court, even if case law supports it. Reliance on the exemption as proof of "innocence" is

foreclosed *before* disposition of the exemption *or* a First Amendment claim has been made. *See, Hickory Grove Music*, supra, 749 F.Supp. at 1039 (damages reduced based on good faith belief in permissibility of conduct). But conversely, pretermitting the issue of innocence prejudices the determination of an exemption or First Amendment protection. It "prejudices the inquiry and impedes arrival at the proper conclusion." *Harper & Row*, supra.

In such a regime, only *Aiken* himself would have certainty of outcome and thus avoid the onerous and unfair exposure of adjudicating a good faith reliance on Section 110(5) or on the First Amendment. Such a regime frustrates the very goal of the Copyright Clause, which is to assure the public's enjoyment of works in the public domain. Petitioner respectfully submits that this Court should not permit such a result to stand.

CONCLUSION

Petitioner respectfully requests the Court to grant the petition and to issue a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit to reverse the judgment based upon the excessive chill cast on First Amendment rights by application of the Copyright Act in the circumstances; or, alternatively to vacate the judgment, and to direct a remand for application of a proper First Amendment test and full trial on the innocence defense.

Respectfully submitted,

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-4773

D. C. Docket No. 92-1075-CIV-EBD

PERREN-VIBES MUSIC, INC.; POLYGRAM INTERNATIONAL PUBLISHING, INC.; MUSIC SALES CORPORATION; FAMOUS MUSIC CORPORATION; GIORGIO MORODER PUBLISHING COMPANY, ET AL.,

Plaintiffs-Appellees,

versus

INN OF MIAMI AIRPORT, INC.,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(January 27, 1995)

Before TJOFLAT, Chief Judge, COX, Circuit Judge, and DYER, Senior Circuit Judge.

PER CURIAM:

Defendant Inn of Miami Airport, Inc. (Inn) appeals the award of statutory damages, costs and fees to Perren-Vibes Music, Inc., et al. (ASCAP) in a copyright infringement action. The Inn contends that the district court erroneously failed to consider the Inn's innocence and should have reduced the statutory damages award, that

the application of the Copyright Act, in the circumstances of this case, creates a chilling effect and offends the First Amendment, and that there was an abuse of discretion in finding the amount of the attorney's fee award. Except for the award of costs for the travelling expense of plaintiffs' counsel for deposition purposes, we affirm.

The Inn's liability for infringement was determined by the district court on ASCAP's motion for summary judgment, in which it was found that the Inn's behavior constituted "not innocence but indifference." Therefore, the only issue for trial involved the relief sought. After a bench trial, the district court awarded ASCAP minimum statutory damages of $500.00 per infringement, pursuant to 17 U.S.C. § 504(c)(1), and its costs, including plaintiffs' attorneys' travel expenses in taking depositions. The court also awarded attorneys' fees.

In order to sustain a finding of innocent infringement, the Inn was required to establish that it "was not aware and had no reason to believe that [its] acts constituted an infringement of copyright. . . . " 17 U.S.C. § 504(c)(2). The record in this case amply supports the district court's rejection of the defense of innocence.

The Inn's argument that the application of the copyright law to its infringing performance violates the First Amendment is without merit. In these circumstances, the First Amendment is subject to rights under the copyright laws. We held in *Cable/Home Communication Corp. v. Network Productions, Inc.*, 902 F.2d 829, 849 (11th Cir. 1990), that "[w]ith respect copyright protection '[t]he first amendment is not a license to trammel on legally recognized rights in intellectual property.' *Dallas Cowboys*

Cheerleaders, Inc. v. Scoreboard Posters, Inc., 600 F.2d 1184, 1188 (5th Cir. 1979)."

Finally, we find no abuse of discretion in the district court's award of attorneys' fees. The Copyright Act explicitly provides that "the court in its discretion may allow the recovery of full costs by or against any party [and] may also award a reasonable attorney's fee to the prevailing party as part of the costs." 17 U.S.C. §§412, 505. We entertain no doubt that ASCAP was the prevailing party which succeeded "on a significant litigated issue that achieve[d] some of the benefits sought by that party in initiating the suit." *Cable/Home Communication*, 902 F.2d at 853. The district court followed the criteria mandated by *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974). We find no clear abuse of discretion in the district court's award of attorneys' fees. *N.A.A.C.P. v. City of Evergreen, Alabama*, 812 F.2d 1332, 1334 (11th Cir. 1987).

The district court's award of $897.53 as costs for ASCAP's attorneys' travel expenses for the taking of depositions was error. This item is not taxable under 28 U.S.C. §1920. Absent extraordinary circumstances, not claimed here, such costs are not recoverable. *Wahl v. Carrier Mfg. Co., Inc.*, 511 F.2d 209, 217 (7th Cir. 1975); *Gerber v. Stoltenberg*, 394 F.2d 179 (5th Cir. 1968).

ASCAP applies for the allowance, under the statute, for additional attorneys' fees as part of the costs of this appeal. The statute contemplates such fees. We deem it proper that such allowance be considered by the district court rather than this court, and direct that that court consider an application therefor by ASCAP. *Serbin, Inc. v.*

Key West Hand Print Fabrics, Inc., 381 F.2d 735, 736 (5th Cir. 1967).

We affirm the judgment of the district court except for the award of costs for the attorneys' travel expenses in the amount of $897.53.

AFFIRMED, with directions.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-4773

D. C. Docket No. 92-1075-CIV

PERREN-VIBES MUSIC, INC; POLYGRAM INTERNATIONAL PUBLISHING, INC.; MUSIC SALES CORPORATION; FAMOUS MUSIC CORPORATION; GIORGIO MORORDER PUBLISHING COMPANY, et al.,

Plaintiffs-Appellees,

versus

INN OF MIAMI AIRPORT, INC.,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

Before TJOFLAT, Chief Judge, COX, Circuit Judge, and DYER, Senior Circuit Judge.

JUDGMENT
(Filed Jan. 27, 1995)

This cause came to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the

same is hereby AFFIRMED with directions in accordance with the opinion of this Court;

It is further ordered that defendant-appellant pay plaintiffs-appellees the costs on appeal to be taxed by the Clerk of this Court.

Entered: January 27, 1995
For the Court: Miguel J. Cortez, Clerk

By: /s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: MAR 07 1995

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

PERREN-VIBES MUSIC, INC., et al.,	)	
Plaintiffs,	)	CASE NO. 92-1075-CIV-DAVIS
v.	)	Magistrate Judge Johnson
INN OF MIAMI AIRPORT, INC.,	)	
Defendant.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed May 5, 1993)

This is an action for copyright infringement. Plaintiffs are owners of registered copyrights for certain musical compositions. They are suing Inn of Miami Airport, Inc. (the "Inn") under the Copyright Act of 1976, 17 U.S.C. §§ 101 *et seq.*, contending that the Inn performed their copyrighted musical compositions without authorization.

On April 9, 1993, the Court entered an Order on Motion for Summary Judgment, holding the Defendant liable to the Plaintiffs for the infringement of seven copyrights. In the Order, the Court found that Plaintiffs Perren-Vibes Music, Inc., Polygram International Publishing, Inc., Music Sales Corp., Famous Music Corporation, Giorgio Moroder Publishing Company, Funky Metal Music, Polish Prince Music, Big Elk Music, Flyte Tyme Tunes, and Hideout Records and Distributors, Inc., are the owners of the copyrights of the first seven musical compositions identified in the Complaint. The Court also

found that those musical compositions were publicly performed at the Defendant's place of business, the Airport Lakes Holiday, and that the Defendant had not obtained permission to perform Plaintiffs' compositions publicly. Finally, the Court determined that the Defendant is not an "innocent" infringer, subject only to minimal statutory damages under 17 U.S.C. § 504(c)(2).

By Order dated March 22, 1993, the Court granted Plaintiffs' Motion for Leave to File an Amended Complaint. The Amended Complaint dropped two of the original nine counts for copyright infringement, and it added one count to the remaining seven. The Defendant's Answer to the Amended Complaint was filed on April 15, 1993, and asserted, among other defenses, that the reception of the broadcast of a radio station under a valid license does not constitute a performance; that the First Amendment protects the performance of copyrighted compositions that are broadcast over the radio; and that the Defendant acted in good faith.

The case was tried to the Court on April 15, 1993. Based upon the evidence adduced at the trial, the Court enters the following findings of fact and conclusions of law.

Findings of Fact

1. The Plaintiffs are music publishers and songwriters and members of ASCAP, the American Society of Composers, Authors & Publishers. ASCAP is an unincorporated membership association with more than 55,000 members who write and publish musical compositions. Each member, including each Plaintiff in this action, has

granted ASCAP a nonexclusive right to license nondramatic public performances of the member's copyrighted musical compositions. On behalf of all its members, ASCAP licenses the right to perform publicly all of the copyrighted musical compositions in the ASCAP repertory. ASCAP offers a license for hotels and motels which bases license fees upon the licensee's annual expenditures for live entertainment and uses of mechanical music.

2. Plaintiffs Age to Age Music, Inc., Edward Grant, Inc., and Yellow Elephant Music are the owners of the copyright in the musical composition "Baby Baby," as shown by their Certificate of Copyright Registration. (Pls.' Ex. 1.) As the Court noted in its Order of April 9, 1993, the other Plaintiffs are the owners of the copyrights of their respective musical compositions listed in Schedule "A" of the Amended Complaint.

3. The Defendant, Inn of Miami Airport, Inc., is a Florida corporation which owns, controls, manages, operates and maintains a place of business known as the Airport Lakes Holiday Inn located in Miami, Florida. The president of Inn of Miami Airport, Inc., is Richard Wilbourn, an attorney from Mississippi.

4. Musical compositions have been performed at the Airport Lakes Holiday Inn as part of the regular entertainment offered to its patrons. Since prior to 1989, and continuing through January of 1992, the Defendant offered musical entertainment to the patrons of its lounge through an amplified sound system in the form of radio broadcasts and recorded music played by a disc jockey.

Sometime in early 1992, the Defendant stopped using a disc jockey but continued playing radio broadcasts.

5. Sometime before January, 1993, the Defendant installed 33 television sets in its lounge. The sets were tuned to broadcasts of various sporting events and other televised shows. The Defendant continues to use the televisions today, controlling them by remote controls kept behind the bar for the bartenders to operate.

6. The Defendant had entered into an ASCAP license agreement effective January 1, 1984, permitting the Defendant to perform publicly all of the musical compositions in the ASCAP repertory at the Airport Lakes Holiday Inn. The license expired on December 1, 1988, and the Defendant chose not to renew it. At the time the license expired, the Defendant had a credit balance with ASCAP of approximately $1,900.00. The Defendant has not been licensed by ASCAP since December 31, 1988, and has not obtained the permission of any copyright owner to perform copyrighted musical compositions at the Airport Lakes Holiday Inn.

7. After the expiration of the Defendant's ASCAP license, ASCAP wrote several letters to the Defendant. On March 14, 1989, ASCAP's district manager sent a letter to the Defendant at the address of Inn Serve in Meridian, Mississippi. The letter reminded the Defendant that its ASCAP license had expired. ASCAP sent the Defendant additional letters on May 8, June 22, and August 15, 1989, each warning about unauthorized performances at the Airport Lakes Holiday Inn.

8. Late in 1989, Richard Wilbourn had a conversation with ASCAP's district manager in which he stated

that he was not sure whether there was any musical entertainment at the Airport Lakes Holiday Inn. In response, on December 7, 1989, ASCAP's district manager wrote to the Defendant advising that the hotel was currently using a disc jockey in the lounge. ASCAP sent further letters on August 15, August 29, September 19, and October 22, 1990, and January 3, 1991. Each letter warned that the unauthorized performance of ASCAP members' copyrighted works would constitute infringement, and each offered to negotiate a licensing agreement to secure the Defendant's use of the works.

9. Richard Wilbourn and Scott Lovett received these communications from ASCAP, and Mr. Wilbourn refused the offered license agreements on behalf of the corporation. Mr. Wilbourn directed Mr. Lovett to stop the use of the copyrighted material at the Airport Lakes Inn, but he did not follow up to find out whether his directions were properly implemented.

10. Some time after the ASCAP license expired, in 1989 or 1990, Scott Lovett told Mary Bailey, manager of the Airport Lakes Holiday Inn, to stop playing music. He also claims that on his visits to the hotel, he instructed hotel personnel to disconnect the deejay booth, and that he received assurances that it had been disconnected. However, Mr. Lovett said that he was not aware that disc jockey performances continued at the Airport Lakes Holiday Inn through 1991.

11. Mary Bailey served as general manager of the Airport Lakes Holiday Inn from August 1988 through January 1992. Throughout this time, the hotel regularly employed a disc jockey at the lounge. Ms. Bailey testified

that she did not remember any directions from Inn Serve regarding the use of music at the hotel, and that she did not recall conversations with Mr. Lovett regarding the use of copyrighted music at the hotel.

12. In May, 1991, the Inn of Hammond, one of the hotels administered by Inn Serve, was sued by ASCAP for copyright infringement.

13. Mr. Wilbourn identified a written policy statement issued by Inn Serve Corporation, which stated in part: "Any music played in the Lounge must conform to the regulations of ASCAP/BMI unless non-copywritten music is used."

14. The Defendant also offered the testimony of the Airport Holiday Inn's current manager, William James, and its beverage and food manager, Lee Gayle. Mr. Gayle testified that in early 1991 he learned that copyrighted music was not to be played at the hotel. Acting in accord with this policy, Mr. Gayle instructed the disc jockey to play only Latin music. Mr. Gayle admitted that he did not investigate whether Latin music was copyright protected, and he did not follow up to insure that the disc jockey followed his instructions. He further testified that he did not stop the play of radio broadcasts over the sound system because he did not think anything was wrong with that.

15. Mr. James, who became manager of the Defendant's hotel in January, 1992, stated the hotel's policy was not to play copyrighted music. He stated that currently the lounge has multiple television receivers which are kept muted, except when major sporting or news events are televised. The audio of the receivers is controlled by

remote controls used by the bartenders, and the lounge plays licensed Muzak productions as background.

16. On May 24, 1991, ASCAP retained Felix Santiago and Steve Kirkland to visit the Airport Lakes Holiday Inn and to report the titles of musical compositions performed there. The reports of these investigators state that musical entertainment was provided in the restaurant and lounge area by means of six large box speakers, audible throughout the approximate 5,000 square-foot area, and that broadcasts of radio stations were played from 8:10 p.m. until 10:10 p.m., when a disc jockey began playing recorded music until 1:41 a.m. The reports also show that the compositions "Reunited" and "Let's Put It All Together" were performed by the lounge's deejay, and that the compositions "Take My Breath Away (Love Theme from Top Gun)," "More Than Words," "If You Love Me Now," "Human," "Against the Wind," and "Baby Baby" were publicly performed by radio broadcast on May 24, 1991. The gross revenues from food and beverages that day was $1,057.84.

17. On January 15, 1993, Felix Santiago and Walter Busse went to the Airport Lakes Holiday on behalf of ASCAP to investigate its performances of music. Their reports indicate that the restaurant and lounge had replaced its sound system with thirty-three television sets, including two large-screen televisions. The reports also indicate that audio from local television channel 7, WSVN, was heard from 9:12 p.m. to 12:05 a.m., which included the performance of musical compositions in commercials and movie theme songs.

18. Mr. Wilbourn testified that the Defendant has no intention of obtaining an ASCAP license for the Airport Lakes Holiday Inn. Had the Defendant been licensed by ASCAP from January, 1989, through December, 1992, the total fees to be paid to ASCAP would have been $2,383.

Conclusions of Law

1. This Court has jurisdiction over this action under 28 U.S.C. § 1338(a), which grants the district courts original, exclusive jurisdiction over any civil action relating to federal copyright law.

2. A prima facie case of copyright infringement requires establishing ownership of a valid copyright in the work and copying by the defendant. *Southern Bell Tel. & Tel. Co. v. Associated Tel. Directory Publishers*, 756 F.2d 801, 810 (11th Cir. 1985); *see also U.S. Songs, Inc. v. Downside Lenox, Inc.*, 771 F. Supp. 1220, 1224 (N.D. Ga. 1991) (providing a four-prong analysis based on these elements).

3. Plaintiffs have produced evidence of their ownership of registered copyrights for each of the compositions at issue. This satisfies the first element of infringement. *Donald Frederick Evans & Assocs., Inc. v. Continental Homes, Inc.*, 785 F.2d 897, 903 (11th Cir. 1986); *Arthur Rutenberg Corp. v. Dawney*, 647 F. Supp. 1214, 1216 (M.D. Fla. 1986). Registration is prima facie evidence of a valid copyright. 17 U.S.C. § 410(c); Mellvile B. Nimmer & David Nimmer, *Nimmer on Copyright* § 13.01[A], at 13-7 (1992).

4. Plaintiffs have also proved that Inn of Miami Airport performed their copyrighted works on May 21,

1991. The uncontroverted evidence of ASCAP's two investigators, Felix Santiago and Steve Kirkland, establishes the performance of the compositions at issue.

5. The Defendant contends, however, that the performance of copyrighted musical compositions by amplified radio transmission does not violate the Copyright Act. The Act specifies an exemption from infringement for

> communication of a transmission embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes, unless –
>
> (A) a direct charge is made to see or hear the transmission; or
>
> (B) the transmission thus received is further transmitted to the public;
>
> . . . .

17 U.S.C. § 110(5). This exemption applies not only to receivers used in homes, but also those used in commercial establishments. However, to be "a single receiving apparatus of a kind commonly used in private homes," the sound system must be relatively unsophisticated and must broadcast to a limited area. *Broadcast Music, Inc. v. Claire's Boutiques, Inc.*, 949 F.2d 1482, 1486-94 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1942 (1992).

The exemption for home systems resulted from the 1976 revision of copyright law. Under the prior, 1909 version of the law, the Supreme Court had ruled that a fast-food restaurant that played a radio over four speakers did not infringe anyone's copyrights. *Twentieth*

Century Music Corp. v. Aiken, 422 U.S. 151, 95 S. Ct. 2040, 45 L. Ed. 2d 84 (1975). In *Aiken*, the defendant owned a small fast-food shop. Many patrons carried out the food they purchased. The others usually stayed only five minutes or so, and seldom remained longer than fifteen minutes. The shop had a simple radio with four ceiling-mounted speakers. To limit the far-reaching impact of considering playing the radio a form of copyright infringement, the Court held that a radio broadcast is not a "performance" in such a context. *Id.* at 157-64, 95 S. Ct. at 2044-48.

6. In adopting the Copyright Act of 1976, Congress expanded the definition of "perform," but utilized the home systems exemption to prevent infringement actions for minimal uses of copyright protected works. *Broadcast Music*, 949 F.2d at 1487-89. The legislative history of the Act reveals that Congress considered the fact situation of *Aiken* to be the "outer limit" of the exemption. H. Rep. No. 94-1946, 94th Cong., 2d Sess. 86, 87 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5701; *see also Broadcast Music*, 949 F.2d at 1488-89 (discussing the legislative history of the exemption).

7. Considering *Aiken* as the applicable standard, the Defendant's performances exceed the outer limit of the home systems exemption. The reports of ASCAP's investigators reveal that the Defendant's radio broadcasts were played over a sound system including two speakers mounted above four large box speakers, about twenty feet apart on opposite ends of a dance floor. The sound system is thus larger and more complex than the one in *Aiken*. *See U.S. Songs*, 771 F. Supp. at 1227 (describing similar cases in which restaurant sound systems exceed

the home system exemption). Furthermore, unlike the radio in *Aiken*, Inn's sound system is the center of the lounge's activity. The dance floor alone tells as much. It bears witness that the lounge's music was not background to the din, but an attraction of its own right. Consequently, the lounge's original sound system does not stand within the home systems exemption.

8. In its affirmative defenses and at trial, the Defendant also asserted a constitutional right to perform the Plaintiffs' compositions using amplified radio broadcasts. But the Defendant has not offered law to support this proposition, and opinions to the contrary are legion. "It has long been settled in our jurisprudence that the rights of free expression, embodied in the First Amendment and other legal doctrines, are subject to rights under the copyright and trademark laws." *Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 467 F. Supp. 366, 375 (S.D.N.Y. 1976), *aff'd*, 604 F.2d 200 (2d Cir. 1979). The power of Congress "[t]o promote the Progress of Science and useful Arts" is itself embodied in the Constitution. U.S. Const. art. I, sec. 8. Consequently, the Court rejects this defense.

9. The Plaintiffs have elected to recover statutory damages under the Copyright Act, as is their right as copyright owners. *See* 17 U.S.C. § 504(c)(1) (allowing an election between statutory and actual damages). The Court has the discretion to raise statutory damages to $100,000 or lower them to $200 per violation, depending on the defendant's knowledge of the work's copyright protection at the time the infringement took place. *See id.* subsec. (c)(2). Generally, however, the Court should apply

statutory damages between $500 and $20,000 per violation. *Id.* subsec. (c)(1). Factors to be considered in the award are the Defendant's expenses saved and profits reaped by the infringement; the revenues lost by the Plaintiff; and the degree of the infringer's knowledge or will in committing the violation. *Morley Music Co. v. Cafe Continental, Inc.*, 777 F. Supp. 1579, 1583 (S.D. Fla. 1991).

10. The Defendant deserves no more than the minimum applicable statutory damages levied against it. The Court has determined and remains convinced that the Defendant's behavior "constitutes not innocence, but indifference." Order of Apr. 9, 1993. However, Defendant's upper management eventually took substantial steps to correct the infringing activity. Although the Defendant did not follow up on these measures to ensure their effectuation, the Defendant incrementally diminished and ultimately ceased the infringing activity. Also, the Defendant's revenue and the Plaintiffs' loss approximately $1,000 and $2,400, respectively – do not justify increasing the damages. Consequently, the Court will award statutory damages of $500 per infringement, for a total of $4,000.

11. The Plaintiffs have also asked the Court to enjoin the Defendant from ever playing their copyrighted compositions. The Court has the power to issue "temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright." 17 U.S.C. § 502(a). In order to implement such a permanent injunction, the Plaintiffs must establish a substantial likelihood of the Defendant's future infringement. *See Pacific & Southern Co. v. Duncan*, 744 F.2d 1490, 1499 (11th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985).

Consequently, if the defendant has ceased its infringing conduct and shows no inclination of repeating its behavior, a substantial likelihood of future infringement does not exist, so an injunction should not issue. *Reader's Digest Ass'n, Inc. v. Conservative Digest, Inc.*, 821 F.2d 800, 807 (D.C. Cir. 1987).

12. The Plaintiffs have not satisfied their burden of showing a substantial likelihood of future infringement. The Defendant's use of televisions is not likely to infringe on the Plaintiffs' rights. Plaintiffs have not alleged that their copyrighted compositions were in fact infringed in this manner; they simply contend that the Defendant operates televisions, and by their operation, the televisions may play ASCAP-licensed compositions, including their own. On the other hand, the Defendant has established that it does not operate the audio portions of the televisions except for sports events and news programs, which are not likely to involve the performance of Plaintiffs' musical compositions. The Defendant has changed the atmosphere of its lounge from a "disco" to a "sports bar," and thus the Defendant has little motivation to play music. Its licensed Muzak productions serve its limited musical needs.

13. The Court has the discretion to award costs and a reasonable attorney's fee to the prevailing party. *Cable/Home Communication Corp. v. Network Productions., Inc.*, 902 F.2d 829, 8534 (11th Cir. 1990). Such an award is proper in this case. Although the Defendant's behavior was not entirely "willful," it was not "innocent," either. If the Court did not re-allocate the cost of litigating a matter such as this, in which relatively small damages are at

issue, the owner could not afford to protect the copyright, and the protection of these artworks would be lost.

In view of the foregoing, it is hereby

ORDERED AND ADJUDGED that Judgment shall be entered in accordance with these Findings of Fact and Conclusions of Law. Within ten days of the date stamped upon this Order, Plaintiffs shall submit proof of costs and a reasonable attorney's fee, and a proposed form of final judgment in accordance with these Findings and Conclusions.

DONE AND ORDERED in Chambers, at Miami, Florida, this 4th day of May, 1993.

/s/ Edward B. Davis
EDWARD B. DAVIS
UNITED STATES DISTRICT JUDGE

cc: David M. Rogero, Esq.
Susan J. Cole, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

PERREN-VIBES MUSIC, INC., et al., Plaintiffs, v. INN OF MIAMI AIRPORT, INC., Defendant.	CASE NO. 92-1075-CIV-DAVIS Magistrate Judge Johnson

FINAL JUDGMENT

(Filed June 9, 1993)

THIS MATTER having been tried by the Court without a jury, the Court has held that judgment shall be entered for the Plaintiffs and against the Defendant, as reflected in the Findings of Fact and Conclusions of Law dated May 4, 1993. The Court has also reviewed the Plaintiffs' Application for Award of Costs and Attorneys' Fees and the Defendant's Response to the Application. The parties agree, and the Court concurs, that the rates charged by the Plaintiffs' attorney are reasonable. Furthermore, considering the arguments raised by the Defendant, the Court does not consider the hours expended unreasonable. Therefore, based upon the foregoing, it is

ORDERED AND ADJUDGED that Judgment is rendered for the Plaintiffs, Perren-Vibes Music, Inc., Polygram International Publishing, Inc., Music Sales Corp.,

Famous Music Corporation, Giorgio Moroder Publishing Company, Funky Metal Music, Polish Prince Music, Big Elk Music, Flyte Tyme Tunes, Hideout Records and Distributors, Inc., Age to Age Music, Inc., Edward Grant, Inc., and Yellow Elephant Music, and against the Defendant, Inn of Miami Airport, Inc., in this cause, and that Plaintiffs recover from the Defendant the following sums:

A.	the sum of $500.00 for each of the eight infringements for total statutory damages of	$ 4,000.00
B.	reasonable attorneys' fees	$ 20,308.58
C.	court costs	$ 2,308.50
Total		$ 26,617.08

with interest at the rate prescribed by 28 U.S.C. § 1961 until satisfied, for all of which let execution issue.

DONE AND ORDERED in Chambers, at Miami, Florida, this 8th day of June, 1993.

/s/ Edward B. Davis
EDWARD B. DAVIS
UNITED STATES DISTRICT JUDGE

cc: David M. Rogero, Esq.
Susan J. Cole, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

PERREN-VIBES MUSIC, INC., et al., Plaintiffs, v. INN OF MIAMI AIRPORT, INC., Defendant.	CASE NO. 92-1075-CIV-DAVIS Magistrate Judge Johnson

ORDER ON MOTION FOR SUMMARY JUDGMENT

(Filed Apr. 9, 1993)

Before the Court is Plaintiffs' Motion for Summary Judgment. (D.E. 23.) Plaintiffs are owners of registered copyrights for certain musical compositions. They are suing Inn of Miami Airport, Inc. (the "Inn"), for infringement under the Copyright Act of 1976, 17 U.S.C. §§ 101 *et seq.*, based on the alleged public performance of the compositions. Because the Inn's liability is essentially undisputed, the Court will grant partial summary judgment. However, because the Inn's willfulness is unclear, the Court will defer final judgment until after a hearing on remedies.

I. Background

The Plaintiffs are owners of copyrighted songs and members of the American Society of Music Composers, Authors and Publishers ("ASCAP"). Each has granted

ASCAP a nonexclusive right to license public performances of the member's copyrighted musical compositions.

The Inn owns and operates the Airport Lakes Holiday Inn (the "Holiday Inn"), located at 1101 Northwest Fifty-Seventh Avenue in Miami. The Holiday Inn has a lounge with a sound system consisting of loudspeakers and a disc jockey's booth with radio and stereo. The system's speakers are hung over a small dance floor, near the bar and across from the disc jockey's booth. On May 24, 1991, investigators hired by the Plaintiffs went to this lounge and witnessed the Inn publicly perform the Plaintiffs' copyright-protected musical compositions.

For some time, the Inn had a license from ASCAP to perform Plaintiffs' copyrighted works. However, the Inn refused to renew its license, which lapsed on or before March, 1989. Plaintiffs allege that the Inn nevertheless continued to broadcast the protected musical compositions at various times, including the incident in May of 1991.

On May 11, 1992, Plaintiffs filed their Complaint, and on February 16, 1993, they moved for summary judgment. However, later Plaintiffs moved to amend their Complaint to drop certain counts and plaintiffs and add others, but still seek recovery only for songs broadcasted on May 24, 1991. The Court granted leave to amend. (D.E. 35.) Because the amendment will marginally alter the Plaintiffs' claims, the Court will consider this Motion

under the original Complaint, and only to the extent it would not be superseded by amendment.[1]

II. Discussion

In reviewing this Motion, the Court will not grant summary judgment unless the movant demonstrates no genuine dispute exists as to any material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). Similarly, the movant may show an absence of evidence in a material issue where its opponents bear the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). All reasonable doubts as to the facts are to be resolved in favor of the party opposing summary judgment. *Mercantile Bank & Trust Co. v. Fidelity & Deposit Co.*, 750 F.2d 838, 841 (11th Cir. 1985).

A prima facie case of copyright infringement requires establishing ownership of a valid copyright in the work and copying by the defendant. *Southern Bell Tel. & Tel. Co. v. Associated Tel. Directory Publishers*, 756 F.2d 801, 810 (11th Cir. 1985); *U.S. Songs, Inc. v. Downside Lenox, Inc.*, 771 F. Supp. 1220, 1224 (N.D. Ga. 1991). Based on the

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[1] Consequently, this ruling does not encompass claims by Plaintiffs that were effectively dismissed by the Court's Order granting leave to amend the Complaint. These Plaintiffs, whose copyright-protected works are "Here and Now" and "Here We Go, Let's Rock and Roll," are Ollie Brown Sugar Music, EMI April Music, Inc., D.L.E. Music, Virgin Music, Inc., RGB Dome Music, and Cole/Clivilles Music Enterprises. These Plaintiffs (*See* Mot. Leave Amend ¶ 2.) Nor does this ruling encompass the claims added by the Amended Complaint. These Plaintiffs are Age to Age Music, Inc., Edward Grant, Inc., and Yellow Elephant Music. (*See id.* at 1.)

undisputed facts, the Plaintiffs have established a prima facie case of copyright infringement. Plaintiffs have produced evidence of their ownership of registered copyrights. (Pls.' Mot. Summ. J. Comp. Ex.) The Defendant does not contest Plaintiffs' ownership. This satisfies the first element. *Donald Frederick Evans & Assocs., Inc. v. Continental Homes, Inc.*, 785 F.2d 897, 903 (11th Cir. 1986); *Arthur Rutenberg Corp. v. Dawney*, 647 F. Supp. 1214, 1216 (M.D. Fla. 1986); 17 U.S.C. § 410(c) (registration is prima facie evidence of a valid copyright); Mellvile B. Nimmer & David Nimmer, *Nimmer on Copyright* § 13.01[A], at 13-7 (1992). Plaintiffs have also produced evidence that the Inn performed these works on May 21, 1991. (Kirkland Aff. ¶¶ 5-6; Santiago Aff. ¶¶ 4-8.) The Defendant has not offered evidence to the contrary. Finally, the Plaintiffs offer evidence that the Inn had no valid license. (DeRosa Aff. ¶¶ 10-14.) The Inn does not offer evidence to contest this, either.

The Inn does offer argument, however, on the propriety of the relief Plaintiffs seek. The Plaintiffs request a permanent injunction and damages of $2,000 for each of cause of action, as well as attorney's fees and costs. Rather than recover actual damages, they have elected to recover statutory damages under the Copyright Act. *See* 17 U.S.C. § (requiring an election between statutory and actual damages). On the issue of damages, the Inn offers two arguments.

First, the Inn contends that Plaintiffs' songs were played together in a "medley," so only one violation occurred. It points to language in the statutory damages provision of the Copyright Act, which states that "all the

parts of a compilation or derivative work constitute one work."

The Court cannot accept the Inn's construction of this language, however. First, and most obviously, under the Copyright Act, the Inn's medley is a "copy" rather than a "work." *See* 17 U.S.C. § 101. Moreover, the full context of the language clarifies the "compilation or derivative work" caveat. The subsection provides that

> the copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, in a sum of not less than $500 or more than $20,000 as the court considers just. For the purposes of this subsection, all the parts of a compilation or derivative work constitute one work.

17 U.S.C. § 504(c)(1). This prevents the owner of a copyrighted compilation or derivative work from suing under the copyright for both the first and second generation of the work. However, contrary to the Inn's position, it does not allow a copier to compile several protected works and thereby limit the owners to a single statutory recovery. As the Committee on the Judiciary noted at the time the Act was passed, "Where the suit involves infringement of more than one separate and independent work, minimum statutory damages for each work must be awarded. For example, if one defendant has infringed three copyrighted works, the copyright owner is entitled to statutory damages of at least $750 and may be awarded up to

$30,000." House Rep. No. 94-1476, *reprinted in* 17 U.S.C.A. at 606, 607 (West 1977). Because each of the songs the Inn used is a "separate and independent work," each Plaintiff is entitled to statutory damages for each unauthorized reproduction.

The Inn's second argument is that its infringement did not occur "willful," or indeed, it occurred "innocently." The Court has the discretion to raise statutory damages to $100,000 or lower them to $200 per violation, depending on the defendant's knowledge of the work's copyright protection at the time the infringement took place. *See* 17 U.S.C. § 504(c)(2).

The Court has little difficulty in determining that the statutory damages should not be adjusted downwardly. In order to do so, the Court would have to find that the "infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright. . . . " *Id.* Thus, the standard is quite high; the infringer must have had a reasonable, good faith belief of the innocence of his conduct, marked by a lack of both actual and constructive knowledge of the copyright protection or unlicensed nature of the use. *D.C. Comics Inc. v. Mini Gift Shop,* 912 F.2d 29, 35-36 (2d Cir. 1990); Nimmer & Nimmer, *supra,* § 14.04[B][2][a].

Considering the undisputed evidence, the Inn's belief in its innocence was not reasonable. In essence, the Inn claims that its upper management ordered the Inn's manager to cease playing ASCAP's music, but the music was played nonetheless. However, the Plaintiffs point to the testimony of Richard Wilbourn, the chairman of the Inn Service Corporation, which indicates the Inn did not

monitor its policy. (Wilbourn Dep. at 18, 21.) They have also submitted ample evidence that the Inn had notice of their potential copyright infringement. Since March, 1989, ASCAP notified the Inn of the possibility of infringement by several letters and phone conversations spanning nearly two years. (DeRosa Aff. ¶¶ 11-14.)

Considering this evidence, the Inn's behavior constitutes not innocence, but indifference. Under nearly identical circumstances, the court not only found the responsible corporation was not innocent, but indeed had *willfully* infringed the copyrights. *Rodgers v. Eighty Four Lumber Co.*, 623 F. Supp. 889, 892 (W.D. Pa. 1985). In *Rodgers*, members of ASCAP sued a corporation for infringement. The corporation had a nationwide chain of stores, each of which had a radio receiver and sound system. The stores used these systems to reproduce ASCAP members' protected works. Like the Inn, the defendant in *Rodgers* submitted evidence that, after it received notification from ASCAP that it was violating copyrights, it investigated the matter, attempted to stop the practice, and tried negotiating a license. Also, the defendant corporation claimed it did not profit from the infringements themselves. Nevertheless, because they had received several notices from ASCAP, the court held that the infringements were "deliberate and willful," *id.* at 892, and awarded $2,500 per violation, plus costs and fees.

Although a downward adjustment is unreasonable, the Court is unwilling to fix the damages from the parties' filings. Notably, the decision in *Rodgers* followed an evidentiary hearing. Considering the mixed record, the

Court cannot determine whether the Inn acted "willfully." Such a finding is not required for the damages the Plaintiffs seek, *see* 17 U.S.C. § 504(c)(1), or for an award of attorney's fees, *Cable/Home Communication Corp. v. Network Productions., Inc.*, 902 F.2d 829, 853-54 (11th Cir. 1990).[2] However, it is helpful in the determination of both. *See id.*

The Plaintiffs' request for a permanent injunction also requires an evidentiary hearing. A permanent injunction is proper where the defendant has infringed on the copyright in the past and has a substantial likelihood of doing so again in the future. *Pacific & Southern Co. v. Duncan*, 744 F.2d 1490, 1499 (11th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985). It follows that if the defendant has ceased its infringing conduct and shows no inclination of repeating its behavior, a substantial likelihood of future infringement does not exist, so an injunction should not issue. *Reader's Digest Ass'n, Inc. v. Conservative Digest, Inc.*, 821 F.2d 800, 807 (D.C. Cir. 1987).

The Inn contends that it has ceased playing the copyright-protected songs, and will not do so again. It offers evidence that, since the infringing activities, the Holiday Inn's manager has been replaced, the Holiday Inn has not played any unlicensed works, and the Inn has adopted a policy of not playing such works. (James Dep. at 20, 26.)

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[2] Contrary to the Inn's argument, the Eleventh Circuit does not require a showing of bad faith as a prerequisite to an award of attorneys fees. *Cable/Home Communication Corp.*, 902 F.2d at 853. There are "only two statutory requirements: the fee award should be granted to the prevailing party and the amount should be reasonable." *Id.*

Plaintiffs reply that as recently as January 15, 1993, the Holiday Inn broadcast musical compositions, albeit through televisions. (Santiago Aff. ¶¶ 9, 10.) In light of the Holiday Inn's past infringement, as well as its present means, if not desire, to broadcast the protected works, the Court will have to resolve the matter following an evidentiary hearing

In sum, Plaintiffs have proven copyright infringement under the undisputed evidence. However, without an evidentiary hearing, the Court cannot determine the proper remedy for this infringement. Therefore, after reviewing the record and being otherwise fully advised, it is hereby

ORDERED AND ADJUDGED that Plaintiffs' Motion for Summary Judgment is GRANTED, in part. The Court holds for the Plaintiffs Perren-Vibes Music, Inc., Polygram International Publishing, Inc., Music Sales Corp., Famous Music Corporation, Giorgio Moroder Publishing Company, Funky Metal Music, Polish Prince Music, Big Elk Music, Flyte Tyme Tunes, and Hideout Records and Distributors, Inc., in causes of action numbered one through seven in the original Complaint, (*see* Compl. Sched. A), and against the Defendant on the issue of liability, and defers its ruling on the issues of statutory damages, attorney's fees, and injunctive relief pending an evidentiary hearing.

DONE AND ORDERED in Chambers, at Miami, Florida, this 9th day of April, 1993.

/s/ Edward B. Davis
EDWARD B. DAVIS
UNITED STATES DISTRICT JUDGE

cc: David M. Rogero, Esq.
Susan J. Cole, Esq.

Supreme Court, U.S.
FILED
MAY 30 1995
CLERK

(2)

No. 94-1765

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

INN OF MIAMI AIRPORT, INC.,

Petitioner,

vs.

PERREN-VIBES MUSIC, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Thirteen copyright owners, all of them members of ASCAP, the music copyright licensing organization, brought this copyright infringement action against the operator of a hotel, alleging unauthorized public performances of the copyright owners' songs by a disc jockey performing in the hotel's lounge. The defendant did not dispute that the infringing performances had occurred. Instead, it sought to avoid liability by pleading two defenses, arguing first, that its infringing conduct was "innocent"; and second, that the First Amendment, combined with the *rationale* of this Court's decision in *Twentieth Century Music Corp. v. Aiken*, shielded defendant from liability for infringement by "passive inadvertent reception" of radio broadcasts played over the hotel's sound system. The lower courts rejected both defenses, leading defendant to petition this Court to address two issues:

I. Did the Court of Appeals correctly apply the proper standard for review of the district court's decision granting partial summary judgment for respondents on the issues of liability and the petitioner's "non-innocent" state of mind?

II. Did the Eleventh Circuit properly reject petitioner's novel First Amendment defense?

RULE 29.1 STATEMENT

Respondents are Perren-Vibes Music, Inc., Polygram International Publishing, Inc., Music Sales Corporation, Famous Music Corporation, Giorgio Moroder Publishing Company, Funky Metal Music, Polish Prince Music, Big Elk Music, Flyte Tyme Tunes, Hideout Records and Distributors, Inc., Age to Age Music, Inc., Edward Grant, Inc. and Yellow Elephant Music.

The parent company of Polygram International Publishing, Inc. is Polygram N.V. The parent company of Famous Music Corporation is Paramount Communications, Inc. Respondents have no other parent companies or subsidiaries.

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No. 94-1765

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

INN OF MIAMI AIRPORT, INC.,

Petitioner,

vs.

PERREN-VIBES MUSIC, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The Parties

Respondents are copyright owners who brought an action seeking relief under the Copyright Law, 17 U.S.C. §§ 101, 106(4), 501(a), 502(a), 504(c) and 505, for unauthorized public performances of their copyrighted musical works. Each respondent is also a member of the American Society of Composers, Authors and Publishers ("ASCAP"), the performing rights licensing organization. This Court's opinion in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*,

441 U.S. 1 (1979), describes in detail ASCAP and its licensing activities. (C-1).[1]

Petitioner Inn of Miami, Inc. (the "Inn" or "petitioner") owns and operates a hotel that is open to the public and presents musical entertainment in its disco lounge. On May 24, 1991, the Inn provided such entertainment by mechanical means -- a disc jockey played records amplified over the Inn's sound system and tuned in a radio receiver that retransmitted broadcasts of music over the same sound system. (C-3, ¶¶ 3-4). The radio receiver was a fully integrated component of the Inn's sound system, which also employed six speakers placed twenty feet apart around the lounge's dance floor, was capable of playing videos in synchronization with musical performances, and had public address capabilities. The music was audible throughout the approximately 5,000 square foot area of the lounge. (C-7, ¶ 16, E-2).

Pre-Litigation Dealings between ASCAP and the Inn

Prior to December 31, 1988, the Inn held an ASCAP license agreement which authorized the public performance of all music in the ASCAP repertory at the Inn. That license expired by its terms on December 31, 1988. (C-4, ¶ 6).

Since that time, the Inn has not been licensed by ASCAP. Through correspondence and other contacts, ASCAP explained the need for an ASCAP license or permission obtained directly from the copyright owners, and advised of the consequences of performing copyrighted music without such authorization. Typical of those communications is ASCAP's letter of October 22, 1990 in which ASCAP explained the benefits of its license, advised of its "editing service" available to assist music users who wish to know whether specific songs are in the ASCAP repertory, and warned of potential liability for the unauthorized public performance of copyrighted music. (C-4, ¶¶ 7-8). Petitioner refused all of ASCAP's license offers. (C-4, ¶ 9).

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[1] References are to the appendix to the petition for a writ of certiorari.

Eventually, two independent investigators engaged by ASCAP visited the Inn's disco lounge on May 24, 1991, and heard performances of the respondents' songs as part of the evening's entertainment which featured dancing. This litigation ensued.

Prior and Related Proceedings

The District Court

On February 16, 1993, respondents moved for summary judgment. The evidence of copyright infringement was undisputed (E-1-3-4-9). However, the Inn disputed the propriety of the relief sought (E-4), arguing that its infringing performances were "inadvertent" and "innocent," not "willful," thereby requiring an award of minimum statutory damages ($200 per infringement pursuant to 17 U.S.C. § 504 (c)(2)).

By Order filed April 9, 1993, the district court granted partial summary judgment on the issue of liability and rejected the Inn's claim of innocence (E-1-3-4-9), holding that the Inn had failed to sustain its burden of proving that its conduct was "innocent." Citing the specific language of 17 U.S.C. § 504(c)(2) -- the requirement that to justify a finding of "innocence," it must be proven that the "infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright. . . ." -- the court concluded that, based on

> . . . *the undisputed evidence, the Inn's belief in its innocence was not reasonable.* In essence, the Inn claims that its upper management ordered the Inn's manager to cease playing ASCAP's music, but the music was played nonetheless. However, the Plaintiffs point to the testimony of Richard Wilbourn, the chairman of the Inn Serve Corporation, which indicates that the Inn did not monitor its policy. (Wilbourn Dep. at 18, 21.) *They have also submitted ample evidence that the Inn had notice of their potential copyright infringement.* Since March, 1989, ASCAP notified the Inn of the possibility of

> infringement by several letters and phone conversations spanning nearly two years. (DeRosa Aff. ¶¶ 11-14.)
>
> *Considering this evidence, the Inn's behavior constitutes not innocence, but indifference. . . .*
>
> * * *
>
> . . . Although a downward adjustment is unreasonable, the Court is unwilling to fix the damages from the parties' filing. . . . Considering the mixed record, the Court cannot determine whether the Inn acted "willfully." Such a finding is not required for the damages the Plaintiffs seek, *see* 17 U.S.C. § 504(c)(1), or for an award of attorney's fees, *Cable/Home Communication Corp. v. Network Productions, Inc.*, 902 F.2d 829, 853-54 (11th Cir. 1990) [footnote omitted]. However, it is helpful in the determination of both. *See id.*

(E-6-7-8) (emphasis added).[2]

Accordingly, the court reserved ruling on the issue of relief pending an evidentiary hearing. (E-9).

The case was tried to the court on April 15, 1993. That same day, the Inn filed its answer to the amended complaint, asserting for the first time at the trial, among other affirmative defenses, that (1) its radio-over-loudspeaker uses were not "performances" under the Copyright Act; and (2) it had a First Amendment right to rebroadcast respondents' copyrighted songs over its radio-over-speaker system. (C-2, E-3). The district court considered and rejected both defenses and concluded that "[a]lthough the Defendant's behavior was not entirely 'willful,' it was not 'innocent,' either." (C-13, ¶ 13). Accordingly, the court awarded respondents minimum statutory damages of $4,000 ($500 per infringement) pursuant to

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[2] As the district court noted, the Inn's president, Mr. Wilbourn, is also a practicing attorney. [C-3, ¶ 3].

17 U.S.C. § 504(c)(1) and their costs, including attorneys' fees of $22,617.08 (D-2).

In his findings and conclusions, the trial judge recognized that he faced the narrow issue of determining whether the specific requirements of the Section 110(5) exemption were applicable to the Inn's radio-over-speaker system. On the basis of the relevant statutory language, the legislative history, and cases interpreting the scope of § 110(5), the court concluded that the Inn's radio-over-speaker performances, as a factual matter, exceeded the limits of the Section 110(5) exemption. (C-9-11, ¶¶ 5-7). The court also found that the music was used by petitioner as ". . . an attraction of its own right," as shown by its dance floor alone. Thus, the court found:

> Considering [*Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975)] as the applicable standard, the Defendant's performances exceed the outer limit of the home systems exemption. The reports of ASCAP's investigators reveal that the Defendant's radio broadcasts were played over a sound system including two speakers mounted above four large box speakers, about twenty feet apart on opposite ends of a dance floor. The sound system is thus larger and more complex than the one in *Aiken. See U.S. Songs [v. Downside Lenox, Inc.]*, 771 F. Supp. [1220 (N.D. Ga. 1991)] at 1227 (describing similar cases in which restaurant sound systems exceed the home system exemption). *Furthermore, unlike the radio in Aiken, Inn's sound system is the center of the lounge's activity. The dance floor alone tells as much. It bears witness that the lounge's music was not background to the din, but an attraction of its own right. Consequently, the lounge's original sound system does not stand within the home systems exemption.*

(C-10, ¶ 7) (emphasis added).

Similarly, the trial judge had no difficulty, based on a "legion" of cases, rejecting the Inn's constitutional argument that the application of the Copyright Law to its infringing

performances by means of the radio-over-speaker system in its disco lounge area violated First Amendment rights. The court concluded:

> In its affirmative defenses and at trial, the Defendant also asserted a constitutional right to perform the Plaintiffs' compositions using amplified radio broadcasts. But the Defendant has not offered law to support this proposition, and opinions to the contrary are legion. "It has long been settled in our jurisprudence that the rights of free expression, embodied in the First Amendment and other legal doctrines, are subject to rights under the copyright and trademark laws." *Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 467 F. Supp. 366, 375 (S.D.N.Y. 1976), *aff'd*, 604 F.2d 200 (2d Cir. 1979). The power of Congress "[t]o promote the Progress of Science and useful Arts" is itself embodied in the Constitution. U.S. Const. art. I, sec. 8. Consequently, the Court rejects this defense.

(C-11, ¶ 8) (emphasis added).

The trial court also revisited the issue of petitioner's conduct, rejecting again the defense of "innocence" on the basis of the evidence adduced at trial -- including the extensive trial testimony of petitioner's officers and employees, as well as ASCAP's District Manager. The trial judge stated:

> The Court has determined and remains convinced that the Defendant's behavior "constitutes not innocence, but indifference." Order of Apr. 9, 1993.

(C-12, ¶10, C-13, ¶13).

The Court of Appeals

The Inn asked the court of appeals to reverse on the grounds that: (1) the trial court failed to consider fully the innocent nature of its conduct and thereby erred in failing to reduce the award of statutory damages; (2) the application of the Copyright Act in the circumstances of this case would

create a "chilling effect" and offend the First Amendment; and (3) the trial court abused its discretion in its determination of the attorney's fee award.[3]

Rejecting the Inn's "innocence" defense, the court of appeals concluded:

> In order to sustain a finding of innocent infringement, the Inn was required to establish that it "was not aware and had no reason to believe that [its] acts constituted an infringement of copyright. . . ." 17 U.S.C. § 504(c)(2). The record in this case amply supports the district court's rejection of the defense of innocence.

(A-2).[4]

Similarly, the court of appeals rejected the Inn's First Amendment defense as "without merit":

> The Inn's argument that the application of the copyright law to its infringing performance violates the First Amendment is without merit. In these circumstances, the First Amendment is subject to rights under the copyright laws. We held in *Cable/Home Communication Corp. v. Network Productions, Inc.*, 902 F.2d 829, 849 (11th Cir. 1990), that "[w]ith respect [sic] copyright protection

---

[3] The petition for a writ of certiorari is silent with respect to the issue of the award of costs and attorneys' fees (and the additional attorneys' fees allowed by the Eleventh Circuit as part of the costs of the appeal), so we need not discuss the point further.

[4] The court of appeals effectively approved the trial court's exercise of its discretion in denying the Inn's request for minimum statutory damages of $200 per infringement. As the drafters of Section 504(c)(2) wrote: "The basic principle underlying this provision is that the courts should be given discretion to increase statutory damages in cases of willful infringement and to lower the minimum where the infringement is innocent." H.Rep. No. 94-1476, 94th Cong., 2d Sess. at 162 (1976), *reprinted in* 1976 U.S. Code Cong. & Ad. News at 5778.

> '[t]he first amendment is not a license to trammel on legally recognized rights in intellectual property.' *Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc.*, 600 F.2d 1184, 1188 (5th Cir. 1979).

(A-2-3).

Related Proceedings in the Federal Courts

This Court should be aware that ASCAP members filed an earlier action for copyright infringement against the corporate owner of the Inn of Hammond in Hammond, Louisiana. This is a related business entity -- Mr. Wilbourn is the principal owner of that corporation. *Jobete Music Co., Inc. v. Inn of Hammond, Inc.* No. 91-2058 (E.D. La. Feb. 7, 1992). That action resulted in entry of judgment for the plaintiff-copyright owners. The judgment was affirmed, *per curiam*, and without an opinion by the Court of Appeals for the Fifth Circuit. *Jobete Music Co., Inc. v. Inn of Hammond, Inc.*, No. 92-3364 (5th Cir. March 19, 1993). And, there is currently pending in the Southern District of Florida a second action against the Inn's successors-in-interest, Hernando Realty Corporation and Inn Serve Corporation, 93-710-CIV-KING (S.D. Fl. 1993), also alleging infringement of ASCAP members' copyrighted music.

On this record, and for the reasons stated below, the petition should be denied.

REASONS FOR DENYING THE WRIT

I.

THE DECISION BELOW ACCORDS WITH THE DECISIONS OF OTHER CIRCUITS ON THE APPLICABLE STANDARD OF REVIEW OF A DISTRICT COURT'S DECISION ON A MOTION FOR SUMMARY JUDGMENT

A. The Eleventh Circuit Correctly Applied the Proper Standard of Review

The court of appeals applied the proper standard for reviewing the district court's decision granting partial summary judgment for respondents on the issues of liability and whether petitioner's conduct was "innocent." The Eleventh Circuit has succinctly stated the basis for appellate review: "Appellate review of a grant of summary judgment is plenary, and we must apply the same legal standards used by the district court." *Cable/Home Communication Corp. v. Network Productions, Inc.*, 902 F.2d 829, 841 (11th Cir. 1990). (citations omitted).

The plain language of Rule 56(c) mandates the entry of summary judgment, "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505 (1986). This Court explained:

> By its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.

Anderson, 477 U.S. at 247-48, 106 S. Ct. at 2510 (emphasis in original).

Here, there was no factual issue as to liability so that the district court was correct in granting partial summary judgment on the issue of liability, and rejecting, as a matter of law, the defense of "innocence," based on *undisputed* factual evidence. This left for trial only the issue of appropriate relief and, as a corollary, the "willfulness" of the Inn's conduct. The district court correctly found, as a matter of law, that the Inn's conduct constituted "not innocence but indifference." Implicit in the court's summary rejection of the "innocence" defense was its conclusion that the issue sought to be created was simply not genuine.

Contrary to petitioner's assertion, the court of appeals examined the facts and the underlying claims, and, on the basis of the entire record, was satisfied that no factual issue existed as to liability. In consequence, the Eleventh Circuit agreed with the court below that plaintiffs were entitled to judgment as a matter of law and correctly affirmed the decision.

Petitioner errs in arguing that the Eleventh Circuit applied an improper standard for reviewing the trial court's determination of the issue of its innocence. The district court's finding after trial that the Inn's behavior constituted "not innocence but indifference" may not be upset unless it is "clearly erroneous." *Cable/Home Communication Corp. v. Network Products, Inc.*, 902 F.2d at 852-54. This required the court of appeals to look at the entire record before the district court -- precisely what the court of appeals did. It would have been extraordinary if the Eleventh Circuit had failed to consider that record, especially when the undisputed evidence clearly established petitioner's liability for copyright infringement, and "amply support[ed]" the lower court's rejection of the defense of innocence as a matter of law.

B. The District Court Was Abundantly Fair In Its Determination of the Issue of Innocence

Petitioner also argues that it was "impermissibly prejudiced" by the summary disposition of its "innocence" defense, claiming that "[e]vidence of 'inadvertence' may have risen to the level of proof of 'innocence' had it been permitted to

complete its proof at trial and had the trial judge been permitted the opportunity to assess the demeanor and credibility of crucial witnesses." (Petition, pp. 20-21). This argument misstates the facts.[5] Petitioner did indeed complete its proof at trial, and the trial judge's conclusions *after trial* were based on his evaluation of the credibility of the witnesses' testimony, including Mr. Wilbourn himself. Effectively, therefore, petitioner had two bites at the "innocence" apple at the trial court level.

Finally, as to petitioner's argument that the "disposition of the defense of innocence by summary judgment" was "premature," (Petition, p. 23) we merely note that other district courts in virtually identical cases have summarily disposed of an infringer's factually unsupported claims of "innocence," or a good faith belief that the conduct was non-infringing. *See, e.g., Hickory Grove Music v. Andrews*, 749 F. Supp. 1031, 1039-40 (D. Mont. 1990).[6]

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[5] The district court, never "made a 'determination' of inadvertence as opposed to innocence" (Petition, pp. 19-20). Rather, as quoted above, the district court, on two separate occasions, found that "the Inn's behavior constitutes not innocence, but indifference."

[6] Other cases in which the courts have rejected the "innocence" defense on ASCAP's members' motions for summary judgment include *Tempo Music, Inc. v. Christenson Food & Mercantile Company,* 806 F. Supp. 816 (D. Minn. 1992) (defendant admitted liability, but opposed summary judgment on the issue of relief, claiming that he was entitled to a hearing on the issue of "innocence." The Court denied his request, granted plaintiffs' motion and, without a hearing, awarded greater than minimum statutory damages and attorneys' fees); and *Little Mole Music v. Spike Investment, Inc.*, 720 F. Supp. 751, 755 (W.D. Mo. 1989) (liability was uncontested so the court ordered an evidentiary hearing only to resolve the issue of relief. The court stated that "mere non-deliberate infringement is not 'innocent;' rather defendants must have 'acted in complete ignorance of the fact that [their] conduct might somehow infringe upon the rights of another party' (citation omitted)").

In its brief, petitioner admits that "case law supports" summary disposition of the "innocence" issue. (Petition, p. 23). But, petitioner's reliance on the *Hickory Grove Music* decision, 749 F. Supp. at 1039, is misplaced

(Footnote continued)

II.

THE FACTUAL HOLDING OF THE COURTS BELOW PRESENTS NO QUESTION OF GENERAL IMPORTANCE WARRANTING REVIEW BY THIS COURT

A. The Lower Courts Properly Refused To Apply *Aiken*'s Reasoning To This Case

Petitioner argues that the decisions below should be reviewed because they "conflict with *Aiken*" and reject its reasoning. This argument is flatly wrong because Congress overruled *Aiken* and explicitly rejected the rationale of that decision when it adopted 17 U.S.C. § 110(5), stating in the legislative history that the "*basis* for the *Aiken* decision is completely overturned by the present bill." (Emphasis added.) H.Rep. No. 94-1476, 94th Cong., 2d Sess. 87 (1976), *reprinted in* 1976 U.S. Code Cong. & Ad. News at 5700-01. *Cf. Broadcast Music, Inc. v. Claire's Boutiques, Inc.*, 754 F. Supp. 1324 (N.D. Ill. 1990), *aff'd*, 949 F.2d 1482, 1487-89 (7th Cir. 1991), *cert. denied*, __ U.S. __, 112 S. Ct. 1995 (1992).

As to petitioner's assertion that the court below should have, but did not, address "whether [the First Amendment underpinnings of] *Aiken* ha[ve] survived [the 1976 Act]" (Petition, pp. 6, 8-11, 16-18), the Eleventh Circuit correctly rejected petitioner's argument outright as moot and without merit, warranting no discussion. In addition, petitioner's reliance on the language in *Aiken* is misplaced. This Court's

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(Petition, p. 24). Contrary to petitioner's statement, damages there were *not* reduced, despite the evidence indicating a good faith belief in the applicability of the "home-style" defense. Nor was the issue of "innocence" determined after trial. Rather, by summary judgment motion, without an evidentiary hearing, the court awarded plaintiffs minimum statutory damages under Section 504(c)(1) for non-innocent, non-willful infringement. *See also Buck v. Jewell La Salle Realty Co.*, 283 U.S. 191, 198-199, 51 S. Ct. 410, 411 (1931) (neither lack of intent to infringe nor a good faith belief that conduct is non-infringing will excuse liability for copyright infringement).

decision in *Aiken* merely construed the statutory language, and never considered the constitutionality of the statute or its First Amendment implications. *See Rodgers v. Eighty Four Lumber Co.*, 617 F. Supp. 1021, at 1024, n.2 (W.D.Pa. 1983).

Even assuming *arguendo* that the basis of *Aiken* had not been "overturned" by Congress, petitioner may not rely on the reasoning or the result of *Aiken* for, as the district court correctly found -- and petitioner nowhere disputes -- its performances far exceed the "outer limit" of the § 110(5) exemption. (C-10, ¶¶ 6-7). *See* H.Rep. No. 94-1476, 94th Cong., 2d Sess. at 86-87 (1976), *reprinted in* 1976 U.S. Code Cong. & Ad. News at 5700-01. In this regard, it should be noted that petitioner misrepresents itself, its radio-over-speaker system and the purpose for which it used music when it analogizes itself to Aiken who, as this Court observed, merely turned on the radio to hear ". . .[m]usic, news, entertainment and commercial advertising," 422 U.S. at 152. The undisputed facts as to petitioner's performances, based on the trial court's decision, are that petitioner used the music as an attraction for its lounge's patrons, as distinct from the use in *Aiken*:

> . . . unlike the radio in [Aiken's fast food shop], Inn's sound system is the center of the lounge's activity. The dance floor alone tells as much. It bears witness that the lounge's music was not background to the din, but an attraction of its own right. Consequently, the lounge's original sound system does not stand within the home systems exemption.

(C-11, ¶ 7).

B. The Eleventh Circuit Correctly Rejected Petitioner's Novel First Amendment Defense Based on "Passive Inadvertent Reception"

Petitioner argues that when copyright owners enforce their right of public performance in cases such as this, they are violating the infringer's First Amendment rights by penalizing the infringer for "inadvertent passive reception" of radio broadcasts, thereby denying the public its right of access to

broadcast performances of news and non-copyrighted works in the public domain.[7]

This, says petitioner, would result in a "chilling effect" that would deter many from turning on the radio in order to avoid liability for infringement of copyrighted works. (Petition, pp. 13-16). The argument is indeed a novel one -- petitioner cites no authority for its application in a radio-over-speaker case under 17 U.S.C. § 110(5).[8] Surely, it is petitioner that seeks a radical departure from prior decisions when it urges this Court to resurrect *Aiken* and apply a radically new mode of analysis to cases under § 110(5).

But there is yet another reason for this Court to reject petitioner's invitation to consider a novel First Amendment defense in this case. The undisputed facts belie the argument

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[7] Petitioner's argument is not unlike the view of the defendants in *Robert Stigwood Group Limited v. O'Reilly*, 346 F. Supp. 376, (D.Conn. 1972), *rev'd on other grounds*, 530 F.2d 1096 (2nd Cir. 1976) who claimed that, under the First Amendment, "they have a free-speech right to express themselves through the lyrics and music of the plaintiffs." Judge Zampano disposed of that argument as follows:

> The short answer to the defendants' absolutist approach to the meaning of the First Amendment is that it is simply not the law. Were the First Amendment to be applied literally, our statutes pertaining to perjury, obscenity, mail fraud, among many others, would constitutionally fall.

346. F. Supp at 382-83. This Court cited Judge Zampano's decision with approval in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 578 n.13 (1977).

[8] The cases all turn on the application of the statutory language to the particular sound system. *See, e.g., Broadcast Music, Inc. v. Claire's Boutiques, Inc.*, 754 F. Supp. 1324 (N.D. Ill. 1990), aff'd, 949 F.2d 1482 (7th Cir. 1991), *cert. denied*, __ U.S. __ , 112 S. Ct. 1995 (1992); *Edison Bros. Stores, Inc. v. Broadcast Music, Inc.*, 760 F. Supp. 767 (E.D. Mo. 1991), *aff'd*, 954 F.2d 1419 (8th Cir. 1992), *cert. denied*, __ U.S. __ , 112 S. Ct. 1995 (1992); *Sailor Music v. The Gap Stores, Inc.*, 516 F. Supp. 923 (S.D.N.Y. 1981), *aff'd per curiam*, 668 F.2d 84 (2d Cir. 1981), *cert. denied*, 456 U.S. 945 (1982).

-- the radio performances were anything but the kind of incidental use that might accompany a news broadcast. The Inn's disc jockey played a radio station whose broadcasts of music were suitable for disco dancing, and thus transmitted solely for entertainment purposes. It was for this reason that both courts below summarily rejected the applicability of the § 110(5) exemption, and the same logic should lead to rejection of the First Amendment defense.[9]

* * *

We can think of no more demonstrable waste of scarce judicial resources than petitioner's unrelenting efforts to relitigate yet again the issue of its innocence. Petitioner would have this Court grant the petition and then allow it at least one more opportunity to try to persuade the courts below of its innocence, even though the undisputed facts have already led the trier of the facts to a contrary conclusion. There never was a game less worthy of the candle.[10]

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[9] Petitioner misconceives the policies and purposes of the Copyright Law and the limits of the First Amendment. First Amendment rights do not include the right of piracy. *See Nimmer on Freedom of Speech*, § 2.05[C], p. 2-83 ("The First Amendment guarantees the right to speak; it does not offer a governmental subsidy for the speaker, and particularly at the expense of authors whose well-being is also a matter of public interest."); *Nimmer on Copyright*, § 1.10[A], p. 1.69-70; *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. at 577, n.13 ("We note that Federal District Courts have rejected First Amendment challenges to the federal copyright law on the ground that 'no restraint [has been] placed on the use of an idea or concept [citations omitted]' "); *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 558 (1985). ([I]t should not be forgotten that the Framers intended copyright itself to be the engine of free expression."); *McGraw-Hill v. Worth Publishers Inc.*, 335 F. Supp. 415, 422 (S.D.N.Y 1971) ("Defendants' First Amendment argument . . . can be dismissed as flying in the face of established law").

[10] Simple economics demonstrates the futility of petitioner's case. Thus far, the district court has awarded respondents their costs and fees of $21,719.55. An application for additional attorneys' fees as part of the

(Footnote continued)

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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costs of the appeal will be submitted shortly to the district court pursuant to the per curiam appellate decision. Even if petitioner were to succeed in reducing the damages owed from $500 per infringement to $200 per infringement -- a net reduction of $2,400 -- it would still be a recidivist infringer and would likely face the prospect of an award of yet more of plaintiffs' attorneys' fees.

Supreme Court, U.S.
FILED
JUN 12 1995
OFFICE OF THE CLERK

No. 94-1765

In The

Supreme Court of the United States

October Term, 1994

INN OF MIAMI AIRPORT, INC.,

Petitioner,

vs.

PERREN-VIBES MUSIC, INC., POLYGRAM INTERNATIONAL PULBISHING, INC., MUSIC SALES CORP., FAMOUS MUSIC CORPORATION, GIORGIO MORODER PUBLISHING COMPANY, FUNKY METAL MUSIC, POLISH PRINCE MUSIC, BIG ELK MUSIC, FLYTE TYME TUNES, HIDEOUT RECORDS AND DISTRIBUTORS, INC. AGE TO AGE MUSIC, INC., EDWARD GRANT, INC. AND YELLOW ELEPHANT MUSIC,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF ON PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Respondents misstate the nature of the action and the issues raised on appeal before the Eleventh Circuit. Respondents state that the underlying copyright infringement action was brought on account of unauthorized public performances of the copyright owners' songs *by a disc jockey*. But the action was also brought on account of passive reception of licensed public broadcasts of music by a single radio receiver. The appeal did not address any count involving a disc jockey's playing of records. Petitioner contested on appeal only those counts based upon passive inadvertent reception of a licensed public radio broadcast. Petitioner contended that those counts should not have been held to be infringements under *Aiken;* and that the court erroneously foreclosed cosideration of a downward modification of damages awarded on those counts, given reliance on the homestyle exemption and a First Amendment right of access to news, commercial information, and musical compositions in the public domain.

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STATEMENT OF THE CASE

Respondents quote at length from the district court's order granting summary judgment, including the portion of the order that acknowledged that the issue of willfulness of infringement required further evidentiary hearing. It is precisely this acknowledgement that factual issues relating to the remedies to be awarded required resolution at trial that demonstrates the court's error in granting summary judgment.

Respondents also gratuitously insert reference to an unrelated copyright infringement action that was brought in Louisiana. *Jobete Music Co. Inc. v. Inn of Hammond, Inc.*, No. 91-2058 (E.D. La. Feb. 7, 1992). Reference to that case insinuates that it provided support for the judgment below, although Respondents fail to specify the nature of that support. However, the trial court's finding that no infringement had been willful (a factual issue specifically reserved for trial) refutes Respondents' insinuation. Moreover, the issues on appeal in this case relate to the radio counts, while *Jobete Music* addressed only the playing of records by a disc jockey and was not commenced until after the events of the instant case had occurred. Similarly, Respondents' reference to the action pending in the Southern District of Florida is meaningless, since that action is against a *successor* corporation and concerns events subsequent to those addressed below.

REASONS FOR GRANTING THE WRIT

I.

THE ELEVENTH CIRCUIT MISAPPLIED *TWENTIETH CENTURY MUSIC CORP. V. AIKEN* BY FAILING TO TEST ASSERTED FIRST AMENDMENT INTERESTS AGAINST INADVERTENT PASSIVE COPYRIGHT INFRINGEMENTS

Respondents propose that the decision in *Aiken* addressed no more than the definition of "performance" under the old copyright act. Respondents further state that Petitioner's argument that members of the public would be deterred from turning on a radio and thus suffer a chilling effect is "a novel one."

Petitioner need only refer the Court to its language in *Aiken* to demonstrate the falsity of both of Respondents' premises. This Court considered the *effect* of finding passive inadvertent reception to be susceptible to a determination of liability and described that effect as being highly inequitable:

> . . . [A] ruling that a radio listener 'performs' every broadcast that he receives would be highly inequitable for two distinct reasons. First, *a person in Aiken's position would have no sure way of protecting himself from liability for copyright infringement except by keeping his radio set turned off.*

Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 162-163, 95 S.Ct. 2040, 2047, 45 L.Ed. 84 (1975) (emphasis added). As is clear, this Court's concern was with the issue of liability under the act and with the chill that liability would cast upon all radio usage.

Thus, Petitioner's approach is neither novel, nor is this Court's prior decision as restricted as Respondents argue.

Respondents additionally argue that *Aiken* furnishes no ground of support for the innocence defense, since the district court *subsequently* determined that the equipment surpassed the "outer limit" of the homestyle exemption. This argument proves Petitioner's point that consideration of the homestyle exemption severed from a full evidentiary hearing on the issue of innocence will operate to discourage any reliance on that exemption and thus magnify the First Amendment chill.

A summary determination of the innocence defense "prejudices the inquiry and impedes arrival at the proper conclusion." *Harper, Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 594 (1985) (Brennan, J., dissenting). If alleged infringement is not innocent, it can hardly later be determined exempt, for the two findings are hopelessly inconsistent. The exact prejudice to the inquiry described by Justice Brennan is evident in the instant case.

Respondents next argue that the radio usage was not "incidental such as might accompany a news broadcast." Respondents state that a disc jockey played a radio station that broadcast for "disco" dancing. Respondents thus suggest that the nature of the broadcast *station* is a determinative factor in a finding of infringement. First, this argument misstates the record. There is no record that a disc jockey played the radio, only that a disc jockey later played records. Similarly, there is no testimony that there

was any dancing during the radio broadcasts, or that that station was dedicated to "disco" dancing.

Second, this argument misstates the issues before both courts. Petitioner contends that the court failed to articulate or apply *any* factors that might constitute an appropriate testing of the First Amendment rights as against the asserted copyright interests. This petition seeks this court's assistance in articulating such a test as was, at least implicitly, applied in *Aiken*. The homestyle exemption itself does not afford such a test as is required under the First Amendment, for courts have tended to focus solely upon physical details of sound equipment to the exclusion of other *Aiken* factors. Indeed, many courts regard the copyright revision to require such a restricted view of *Aiken*.

Finally, Respondents contend that because Congress intended to overrule the basis of *Aiken*, the First Amendment issues are moot. However, the lower court made no finding of "mootness." Such a finding would have been a determination that none of *Aiken's* pronouncements survived the copyright revisions. But no court has addressed this actual point – and this is the first point that Petitioner respectfully submits should be addressed by this Court: Does *Aiken* provide protection for passive reception of licensed public broadcasts on a single receiving unit that survives the 1976 revisions to the Copyright Act and that the Eleventh Circuit controverted by failing to apply a proper test for asserted First Amendment interests?

II.

THE ELEVENTH CIRCUIT IGNORED APPLICABLE STANDARDS OF REVIEW

The central error in Respondents' argument is the same as the error in the district court's determination of the summary judgment motion, and the circuit court's treatment of that issue on appeal. A course of conduct cannot constitute lack of innocence as a matter of law where the district court inconsistently acknowledges the existence of genuine issues of material fact regarding willfulness and the remedy to be awarded:

> Although a downward adjustment is unreasonable, the Court is unwilling to fix the damages from the parties' filings. Notably, the decision in *Rodgers* followed an evidentiary hearing. Considering the mixed record, the Court cannot determine whether the Inn acted 'willfully.'
>
> * * *
>
> . . . without an evidentiary hearing, the Court cannot determine the proper remedy for this infringement.

E-7-8. Nor can a subsequent second "finding" after trial somehow cure the error of having foreclosed the hearing of further evidence on that issue or possible downward modification of the damage award as justified by that evidence.

Respondents' argument next impossibly and irreconcilably states that the district court never made a determination of inadvertence as opposed to innocence, but that the district court "found" that the Inn's conduct was not innocent, but indifferent, on two separate occasions.

A "finding" or a "determination" by any other name is still an impermissible resolution of conflicting facts.

Finally, Respondents argue that Petitioner admits that case law supports summary disposition of the innocence issue. However, Petitioner makes no such admission. Petitioner's argument was quite the opposite: "Permitting summary disposition on innocence thus places a price tag on a good-faith submission of each defense to the trial court, even if case law supports it."

Petitioner's position remains as quoted. Severing issues of innocence from issues of willfulness, First Amendment rights, and applicability of the homestyle exemption, places a price tag on a good-faith submission of the exemption and First Amendment interests to the trial court. Even if case law supports application of the exemption, a later rejection of the exemption at trial leaves the Defendant stripped of the right to request a downward adjustment of damages and leaves the court stripped of discretion to refuse to award attorney's fees. Defendant thus must pay an onerous price. The price is simply too high to comport with the protections of the First Amendment that underlie the homestyle exemption and this Court's decision in *Aiken*.

CONCLUSION

Petitioner respectfully requests the Court to grant its Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit to reverse the judgment based upon excessive chill cast on First Amendment rights by application of the Copyright Act in the circumstances; or, alternatively to vacate the judgment, and to direct a remand for application of a proper First Amendment Test and full trial on the innocence defense.

Respectfully submitted,

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